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Nos. 04–1528, 04-1530, and 04-1697

In the Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*

Respondents/Cross-Petitioners.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents/Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE SECRETARIES OF STATE OF NEW HAMPSHIRE, NEW MEXICO, OREGON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether the state interest in combating the public perception of corruption and distortion in the electoral process caused by unlimited campaign spending may sustain narrowly tailored expenditure limits against a First Amendment challenge.

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INTEREST OF THE *AMICI CURIAE*

Amici include the following Secretaries of State: William M. Gardner, Secretary of State of New Hampshire; Rebecca Vigil-Giron, Secretary of State of New Mexico; Bill Bradbury, Secretary of State of Oregon; and Douglas La Follette, Secretary of State of Wisconsin.[1] *Amici* serve as the chief elections officers of their respective States. This responsibility gives them extensive experience with the issues raised in this case.

This case involves a challenge to amendments to Vermont's campaign finance laws – including a limit on campaign expenditures – that were enacted in 1997. These amendments were adopted with the overwhelming approval of bipartisan majorities of both houses of the Vermont Legislature. See *Landell* v. *Sorrell*, 382 F.3d 91, 100 (2d Cir. 2004). The amendments were enacted to serve what the Second Circuit described as "at least two interests in maintaining campaign expenditure limits: preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials." *Id.* at 124. As the district court in this case found, and the Second Circuit agreed, limits on campaign contributions alone have been ineffective in achieving those goals. *Id.* at 116-125. For Vermont, at least, meaningful reform can occur only with the implementation of mandatory spending limits.

Amici submit that affirmance of the Second Circuit's decision upholding Vermont's law is essential if state and local governments are to have the tools that are necessary to protect the integrity of the electoral process. *Amici* believe that

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), is not properly read to establish a *per se* prohibition on mandatory campaign spending limits. But if *amici* are incorrect in that view, they urge the Court to reconsider that decision and permit Vermont to demonstrate that its campaign expenditure limits should survive strict scrutiny. A decision by this Court that the Constitution does not erect an insuperable, *per se* barrier to campaign spending restrictions will assist the states, as laboratories of democracy, in addressing widespread public dissatisfaction with the current system of electioneering – a dissatisfaction that is having a corrosive effect on the citizenry's faith in the democratic process and is discouraging voters from participating in state elections.

INTRODUCTION AND SUMMARY OF ARGUMENT

Vermont officials and their other *amici* address the governing constitutional doctrine, explaining why the First Amendment should not be understood to preclude absolutely the enactment of campaign expenditure limits. *Amici* Secretaries of State will not repeat those doctrinal arguments here. Instead, *amici* will address two points of great concern to public officials with responsibility for the integrity and vitality of state electoral systems: (1) unlimited campaign expenditures undermine public confidence in the electoral process, and thus in the democratic system itself; and (2) state and local experimentation with differing methods of campaign finance regulation may help in the development of effective solutions to this profoundly vexing problem.

Amici urge the Court to uphold the constitutionality of Vermont's mandatory campaign spending limits, thus allowing state legislatures to employ this kind of tool as they seek to address constituent concerns regarding the corruption (real and perceived) and distortion of the political process that are attributable to the unlimited campaign spending. The case for so equipping state legislatures is compelling. Public dissatisfaction with the current system of campaign finance is at an alarmingly high level. Objective indicia reveal that the

public strongly believes that excessive spending fosters corruption of the electoral process. The depth of this concern is confirmed by repeated attempts by state legislatures to reform systems of campaign finance.

A holding that campaign expenditure limits are not *per se* unconstitutional would have healthy consequences for the Nation's political system as a whole. It would permit States to experiment with novel methods of campaign finance reform and to determine which of those methods work best in the real world. This point is illustrated by the unique experience of Albuquerque, New Mexico, which maintained a system of campaign expenditure limits for almost three decades after *Buckley*. That regime attracted extraordinarily broad levels of public support, fostered electoral competition, reduced the inertia of job security for incumbents, and increased public participation in elections for city office. Albuquerque's history strongly suggests the wisdom of relying on the legislative process to develop creative solutions to the pressing social problem of public dissatisfaction with the campaign finance system.

ARGUMENT

A. States Have A Compelling Interest In Using Carefully Crafted Expenditure Limits To Combat A Pervasive Public Perception Of Corruption And Distortion In The Electoral Process

1. This Court has held repeatedly that combating the *appearance* of corruption is a compelling government interest that may properly be redressed with appropriately tailored campaign finance reform. See, *e.g.*, *Buckley*, 424 U.S. at 25; *McConnell* v. *FEC*, 540 U.S. 93, 142 (2003); *FEC* v. *Nat'l Conservative Political Action Comm'n*, 470 U.S. 480, 496-497 (1985). There is nothing "novel [ ]or implausible" in that proposition (*McConnell*, 540 U.S. at 144); the perception that moneyed interests have excessive influence in the political process breeds cynicism about the machinery of democ-

racy and "could jeopardize the willingness of voters to take part in democratic governance." *Nixon* v. *Shrink Mo. Gov't Political Action Comm'n*, 528 U.S. 377, 390 (2000).

Of particular importance here, this problem is not limited to campaign *contributions*, which pose the most obviously plausible risk of corrupting the political process. Governments at all levels have a vital interest in fashioning an electoral system that assures their citizens that the fruits of the process will be an honest, objective, responsive public administration. As the amounts *spent* on American elections have soared, however, there has been a proportional escalation in public cynicism about the quality of government these expenditures have purchased. Here, *amici* focus on this important aspect of the problem: unlimited campaign *expenditures* have a corrosive effect both on voters' confidence in the integrity of government and on public willingness to participate in the political process.

That danger was a central rationale for enacting Vermont's limitation on campaign expenditures. The state legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have increased," and that "[c]itizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns." 1997 Vt. Laws P.A. 64 (H.28), ¶¶ 4, 10. Those findings were amply supported by polling of the Vermont electorate and the testimony of the State's elected officials. See *Landell*, 382 F.3d at 116-117. And it was confirmed by the district court in this case, which found as a fact that the State's expenditure limits would serve to preserve faith in democracy. *Landell* v. *Sorrell*, 118 F. Supp.2d 459, 482-483 (D. Vt. 2000), affirmed in part and vacated in part by 300 F.3d 129; see *Landell*, 382 F.3d at 103.

2. The concern that motivated the Vermont legislature is ubiquitous across the Nation: Empirical data reveal the existence of a pervasive public perception of corruption in elec-

tions that is inextricably intertwined with dismay about excessive campaign spending. It is imperative that state governments have the tools to combat this perception, which is undermining public faith in the integrity of government.

The logical connections that have led much of the public to become disillusioned by unlimited spending on political campaigns are not hard to discern. To begin with, the issue is not just one of "corruption" in the classic sense of bribery or something akin to it. See Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L. J. 1, 5-7 (1997) (discussing varying theories of corruption and their respective scopes). Rather, a significant public concern is that excessive and often grossly imbalanced spending muffles the voices of some candidates and distorts the way vital public issues are ventilated during a campaign. This concern is validated by the reality that approximately 90 per cent of the time, the candidate who spends the most money wins the election. U.S. PIRG Education Fund, THE WEALTH PRIMARY: THE ROLE OF MONEY IN THE 2002 CONGRESSIONAL PRIMARIES at 4 (2002), *available at* www.uspirg.org/ reports/WealthPrimary10_02.pdf.

But that is only one aspect of a larger problem: voters believe that if expenditures are not capped, candidates will be forced to go all out to raise money. That imperative, in the public's view, has myriad unfortunate effects. It fosters classic "money under the table" corruption because it puts a premium on getting campaign cash. It forces elected officials to shirk official duties in favor of raising money and mollifying contributors. With so much money flowing into the system, ordinary voters get the (reasonable) impression that the recipients of that money will be responsive to contributors rather than to the broader electorate. And the ability to spend unlimited amounts gives incumbents a virtually insuperable advantage when they seek re-election; incumbents typically raise more money than their challengers – and almost inevitably win – because contributors may believe (correctly or

not) that they will receive official favors in return for contributions.

Contribution limits, especially in the era of "bundling," are not a complete answer to any of these problems. And the more that is spent on campaigns – with endless television commercials, direct mail, and computerized telephone calls all visible to or heard by the electorate – the more a typical voter will see the visible fruits of campaign spending. Inevitably, this barrage will lead reasonable voters to conclude that raising and spending money is all candidates care about.

Thus, even with contribution limits in place, the evils of an accelerating race for campaign cash sap public confidence in the electoral system:

> The predictable effect [of a bar on expenditure limits] has been to increase the pressures to satisfy the ever-increasing, but uncontrollable, demand for campaign cash. * * * Instead of freeing the political process from the effects of wealth disparity and the reality and appearance of corruption, the mutation produced by *Buckley* places unending pressure on public officials to raise money from special interests in a highly public manner calculated to create precisely the appearance and reality of quid pro quo corruption that the *Buckley* Court recognized as a threat to the democratic process.

Neuborne, *supra*, 37 WASHBURN L.J. at 33-34, 37.

3. This concern is not just theoretical: it is borne out by hard data. Nationally, over two-thirds of registered voters believe that candidates spend too much money on election campaigns. Lake Research Partners, *Survey Results from a Nationwide Survey of 1000 Registered Voters* (hereinafter "*National Survey*"), at 7 (2006), *available at* http://demos.org/campaignfinancesurvey. A nearly identical number correlated election spending with the integrity – or lack of integrity – of the electoral process. *Id.* at 13.

Targeted state polls reveal more detailed insights into voters' perceptions regarding the relationship between corruption and campaign spending. Strikingly, 68 percent of Pennsylvania voters believe that the current level of campaign spending is a "serious threat [to] the basic fairness and integrity of our political system." Lake Sosin Snell Perry & Assoc., Inc., *Banners From a Survey of 500 Registered Voters in the State of Pennsylvania* (hereinafter "*PA Survey*") at 3 (1998), *available at* http://www.courts.state.pa.us/Index/Supreme/appenda.pdf. In fact, "[c]orruption is the word that voters themselves use most frequently in describing what is wrong with campaigns and elections today." *PA Survey*, at 16. Voters in Maryland also equated campaign spending with the term "corruption." The Center for American Politics and Citizenship, University of Maryland, and The Schaefer Center for Public Policy, University of Baltimore, *Marylanders' Opinions of Campaign Finance and Campaign Finance Reform*, at 2 (2002), *available at* www.capc.umd.edu/rpts/MDCampFinSrvy.pdf. The public perception of the situation has deteriorated over time, resulting in a current assessment of democracy as being, in effect, broken. *PA Survey*, at 16; see also *id.* at 11.

Pennsylvania and Maryland have company in this perception. In the words of one commentator, Wisconsin poll results in 2005 "revealed a stunning cynicism, confirming other surveys that consistently place politicos and journalists near the used car salesmen in public confidence." Thomas C. Reeves, *Selfish Politicians* (2005), at 1, *available at* http://hnn.us/blogs/entries/18029.html. The commentator was reacting to figures confirming that "only 6% of the residents in Wisconsin believe their elected official represent the interests of the constituents on important issues." Wisconsin Policy Research Institute, Inc., *Wisconsin Citizen Survey*, October 2005 (hereinafter "*Wisconsin Survey*"), at 12, *available at* http://www.wpri.org/Reports/Volume18/Vol18o6.pdf. Wisconsin voters split nearly evenly between believing that local

officials represent their own interests and believing that they represent special interests. *Ibid.*

The widespread perception that excessive campaign spending is distorting the political process also is reflected in survey data showing that the voting public believes campaign spending limits would curtail corruption of the process. The vast majority – 87 per cent – of registered voters across the country favor the implementation of spending limits. *National Survey* at 8. More than three-quarters of those polled see spending limits as a deterrent to corruption in campaigns. *Id.* at 12. Targeted polls in selected states yield similar results:

- "In November 2000, voters in 56 of Wisconsin's 72 counties were asked whether they supported campaign finance reform that would limit contributions and expenditures and require complete and timely disclosure. Over 90% of the voters answered 'yes' in this referendum * * * ." Wisconsin Briefs from the Legislative Reference Bureau, Brief 01-9, at 1 (March 2001), *available at* http://www.legis.state.wi.us/lrb/pubs/wb/01wb9.

- When polled on spending in judicial elections, 59 per cent of a split sample believed that candidates in Pennsylvania spend too much money, not having been told how much candidates spend. That number jumped to 81 per cent for the portion of the split sample that was given an example of how much a candidate spent last year. *PA Survey* at 4.

- Similarly, "56 per cent of Ohioans favor spending limits for judicial elections." Frontline, *Justice for Sale, Summaries of Selected Studies*, at 6, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/studies.html.

- When West Virginia voters were polled regarding whether they believed "there should be a limit on

> how much a person can spend on running for public office," more than 75 per cent said yes, while only16.8 per cent said no. Ken Hechier, *Financing Elections: West Virgina, the States, and the Nation*, 7 W. VA PUBLIC AFFAIRS REPORTER 3 (1990).

4. Public concern about electoral excesses – and, in particular, with unlimited campaign expenditures – also is reflected in repeated legislative efforts to reform the campaign finance process, at both the state and the federal level. That legislatures have turned to this subject time and again powerfully illustrates continuing dissatisfaction among the electorate.

Before *Buckley*, states experimented widely with expenditure limits. In reaction to public discontent with the spoils system at the turn of the twentieth century, many states enacted spending caps. "[B]y 1932 over half of the states had such provisions. By 1964, thirty states had provisions that attempted, in one way or another, to limit total campaign expenditures." Gross & Goidel, THE STATES OF CAMPAIGN FINANCE REFORM (2003), at 4.

Congress, too, experimented with campaign spending limits for House of Representatives and Senate races. See Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907), as amended by Pub. L. No. 62-3, 37 Stat. 25 (1911) (effecting expenditure limits of $5,000 and $10,000 for U.S. House and Senate campaigns, respectively); Corrupt Practices Act, Pub. L. No. 68-56, 43 Stat. 1070 (1925) (raising those limits to between $2,500 and $5,000 for U.S. House campaigns and between $10,000 and $25,000 for U.S. Senate campaigns).

The Court's decision in *Buckley*, of course, has been widely thought to bar expenditure limits. The consequences of that result have been as damaging as they were predictable. In the post-*Buckley* period, voter participation in both national and gubernatorial elections has generally declined.

Gross & Goidel, *supra*, at 88. Indeed, in 1996, voter cynicism led to the lowest voter turnout in a presidential race in five decades. Donald J. Simon, *Beyond Post-Watergate Reform: Putting and End to the Soft Money System*, 24 J. LEGIS. 167, 174 (1998).

In light of this decline in voter participation, it is not surprising that the appetite for reform at the state and local level remains strong. State and local legislatures have attempted to adopt reforms within the constraints of *Buckley's* perceived approach to expenditure limits. For example:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995-98. Hoover Institution: *Public Policy Inquiry, Campaign Finance, State and Local Overview, available at* http://www.campaignfinancesite.org/structure/states1.html.

- From 1972-1996, 45 campaign finance initiatives and/or referenda, as well as charter amendments on election reform, were placed on state ballots. In 36 of these cases, a majority of voters supported enactment. *Ibid.*

- As of 1998, 24 states had statutes providing some sort of public financing for election campaigns. *Ibid.*

- At least 15 states and major cities such as New York, Seattle, Portland and San Jose have some sort of voluntary expenditure limitation. See Federal Election Commission, *Campaign Finance Law 2000: CHART 3-A: EXPENDITURE LIMITATIONS, available at* www.fec.gov/pubrec/cfl/cfl00/cfl00chart3a.html; Hoover Institution: *Public Policy Inquiry, Campaign Finance, State and Local Overview, supra;* Seattle, City Council Ordinance 107772 (Nov. 30 1978); Press Release, Public Campaign, *"Voter Owned Elections" Be-*

comes Law in Portland, Oregon, (May 19, 2005), *available at* www.publicampaign.org/pressroom/pressreleases/release2005/release_05 _19_05.htm; National Civic League, *Spending Limits Working in San Jose, California*, 3 NEW POLITICS, at 3 (Spring 2002).

- Other states and localities have seen their reform efforts run afoul of what courts perceived to be *Buckley*'s absolute bar on expenditure limits. Albuquerque's comprehensive system of expenditure limits, which is discussed in more detail below, was invalidated by the Tenth Circuit in *Homans* v. *City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004). Ohio attempted to enact spending limits at both state and local levels, but the Sixth Circuit invalidated spending limits in city council races (*Kruse* v. *City of Cincinnati*, 142 F.3d 907 (6th Cir.), cert. denied, 525 U.S. 1001 (1998)), and held that *Buckley* bars spending limits in state judicial campaigns. *Suster* v. *Marshall*, 149 F.3d 523 (6th Cir. 1998). And the federal courts struck down Proposition 73, approved by the California electorate, which prescribed (among other reforms) mandatory limitations on certain types of political expenditures.[2] See *Serv.*

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[2] Majorities of voters supported both Proposition 73 and Proposition 68, which contained voluntary campaign spending limits accompanied by public financing of campaigns. See Robert Dreyfuss, *Reform Beyond the Beltway, States as Laboratories of Clean Money*, 38 THE AMERICAN PROSPECT 50, 53-54 (May/June 1998). Voters preferred the system of mandatory spending limits by an appreciable margin. Before it was invalidated, California courts held that Proposition 73 should take precedence over Proposition 68 because it received more votes. *Taxpayers to Limit Campaign Spending* v. *Fair Political Practices Comm'n*, 51 Cal. 3d 744 (1990).

Employees Int'l Union v. *Fair Political Practices Comm'n*, 721 F. Supp. 1172 (E.D. Cal. 1989); *Service Employees International Union* v. *Fair Political Practices Comm'n*, 747 F. Supp. 580 (E.D. Cal. 1990), aff'd, 955 F.2d 1312 (9th Cir. 1992).[3]

Campaign finance reform was achieved most recently in Connecticut – in an effort that clearly illustrates the connection between public cynicism about the electoral process and the perceived need to limit campaign expenditures. In reaction to a corruption scandal that sent Governor John G. Rowland to prison, Governor M. Jodi Rell announced the introduction of sweeping campaign finance reform legislation. In her January 2005 announcement, Governor Rell noted the voters' perception of an association between electoral corruption and unconstrained campaign spending. She observed that one of the three complaints she hears most often from her constituents is that candidates spend too much money on election campaigns. Press Release, The Office of Governor M. Jodi Rell, *Gov. Rell Introduces Sweeping Reform Proposals for Campaign Finance* (January 10, 2005), at 3, *available*

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[3] Ten years later, the citizens of Massachusetts passed a referendum that provided for voluntary spending limits, accompanied by public financing. The state legislature, however, was unwilling to fund the public financing aspect of the referendum. Applying the state constitution, the Massachusetts Supreme Judicial Court held that the law must be funded or repealed. *Bates* v. *Director of Office of Campaign and Political Finance*, 763 N.E.2d 6 (Mass. 2002). The state legislature consequently repealed the law. Michael Saxl & Meaghan Maloney, *The Bipartisan Campaign Reform Act: Unintended Consequences and Maine's Solution* (2004), at 476-477, *available at* http://www.law.harvard.edu/students/orgs/jol/vol41_2/saxl.pdf. Another campaign finance reform bill, this one containing mandatory expenditure limits, is now pending in Massachusetts. The bill contains no provision for public financing. Mass. HB No. 118 (2005), *available at* http://www.mass.gov/legis/bills/house/ht00/ ht00118.htm.

at http://www.ct.gov/governorrell/cwp/view.asp?Q=288454 &A=1761; see also WHDH 7 News Boston, *Connecticut Lawmakers Pass Sweeping Campaign Finance Bill* (Dec. 21, 2005), *available at* http://www2.whdh.com/news/articles/national/BOS10050/. The reform bill, signed into law by Governor Rell in December 2005, provides for voluntary expenditure limits combined with public campaign financing. 2005 Ct. P. A. 5 (enacting 2005 Ct. S.B. 2103).

Connecticut's experience also illustrates the constraints that states feel in this arena, and their concern that *Buckley*'s perceived bar on expenditure limits handicaps effective reform. During the House debate on Senate Bill 2103, an amendment was proposed that would have eliminated the public financing provision in the reform. In response to the amendment's introduction, Representative Spallone, one of the bill's sponsors, emphasized that state reform efforts may be hamstrung unless expenditure limits are permissible:

> In a perfect world, I think that elections based only on individual contributions without public financing may work. However, we operate in the context of a Supreme Court decision from 30 years ago, which effectively said we can limit the amount that each of us can donate to a campaign, but not the amount that we can each spend on our campaign. And that's [*sic*] created the arms race, as it were, in financing for campaigns at the State, national, and local levels.

Transcript of the House Debate of 2005 Ct. S.B. 2103 at 60 (Nov. 30, 2005).

To be sure, popular clamor for a particular outcome generally is not, of itself, a sufficient basis to overcome constitutional limits on legislative discretion. See *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943). But the public perception that candidates' excessive focus on campaign dollars has corrupted the electoral process and effectively disenfranchised ordinary voters – which is starkly revealed by the

public opinion data and the history of legislative efforts in this area – is itself a problem of constitutional dimension. Our democratic system rests on the principle that eligible voters will participate in the electoral process and will feel justifiably confident that the process and its results are fair, informed, and responsive. And it is difficult to imagine a constitutional interest more compelling than that of preserving the citizenry's faith in democracy.

Moreover, this is not a problem of sacrificing free speech in order to assure electoral integrity. That is a false choice. It is possible to craft spending limits that allow ample room for candidates and their supporters to convey their message thoroughly and forcefully. Indeed, while unlimited campaign spending may increase the volume of speech in one sense, it also may inhibit robust debate of issues, decrease public involvement and confidence in the electoral process, and foster a fundamental disaffection with democratic governance on the part of the electorate.

B. A Rule That Allows States To Experiment With Campaign Expenditure Limits Permit The Development Of Electoral Systems That Combat Public Cynicism While Preserving First Amendment Values

A holding by this Court that campaign expenditure limits may be permissible would not mean that such limits always (or, for that matter, often) would be upheld. Restrictions on campaign spending would be subject to the most exacting constitutional scrutiny. As the Second Circuit recognized in remanding this case for further fact-finding regarding Vermont's expenditure caps (see *Landell*, 382 F.3d at 135-137), proponents of such limits would be obligated to show that the state regulation truly serves a compelling interest, is narrowly tailored, and was formulated to serve its goal effectively.

Unfortunately, the Court's decision in *Buckley* has been widely understood – erroneously, in our view – to stand for

the proposition that no level of corruption (perceived or real) and no level of distortion in the electoral system could be compelling enough to justify campaign spending limits, and that such limits never could be tailored narrowly enough to survive constitutional scrutiny. See *Landell*, 382 F.3d at 107 (citing cases); *id.* at 151-152, 155-156, 159, 172, 185 (Winters, J., dissenting). As a consequence, many courts and state legislatures have taken *Buckley* to deny states the ability to experiment with novel methods of campaign finance reform or to test the practical consequences of spending caps.

That outcome has been "fraught with serious consequences to the Nation" (*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), as states have been unable to make use of what may be the most efficacious tool with which to address the growing public cynicism about the electoral process. By contrast, freeing states to implement expenditure caps if they are able to make the requisite showing would have enormously healthy consequences for the Nation's political system. A constitutional rule that allows states at least to attempt to make the strict showing necessary to justify spending limits could lead to the development of systems that restore public faith in democracy, while also fostering robust debate, candidate interaction with the electorate, a full exploration of pressing issues, and fair campaigns.

This point is illustrated by considering the unique experience of one "courageous" jurisdiction that has been able, in the post-*Buckley* era, to "serve as a laboratory" regarding the real-world effects of campaign expenditure limits. *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting). Beginning in 1974, the city of Albuquerque, New Mexico, made use of mandatory spending limits in local elections. Until those limits were held unconstitutional by the Tenth Circuit three decades later in *Homans*, this regime served the goals of increasing electoral competition – with *greater* access to office by new candidates and *no* sacrifice in voter participation in

elections for city office. See State PIRGs' Democracy Program, *The Case for Limits on Campaign Expenditures*, at 1, *available at* http://www.buckbuckley.com/pdfs/spending_limits_policy_background.pdf. It also served to decrease the advantage that incumbents typically hold in electoral competition. For example, none of the four mayoral candidates who sought reelection during the period between 1974 and invalidation of the spending limits regained their office. Testimony of Donald A. Gross at Tr. 88:6-89:9, *Landell* v. *Sorrell*, 2:99-cv-00146-WKS (D. Vt. June 2, 2000); Anthony Gierzynski, *Albuquerque Election Financing* (2002), at 5-6, *available at* www.nvri.org/library/cases/albuquerque/electionfinancinganalysis.pdf. Albuquerque's figures contrast sharply with other U.S. mayoral races, in which incumbents are reelected approximately 80 per cent of the time. *Ibid.*

The City's pre-*Homans* experience with campaign spending limits also contrasts sharply with developments in 2005, during Albuquerque's first full election cycle without spending limits. That year, the incumbent mayor raised a war chest of nearly $1.2 million, a record-setting amount for Albuquerque. He was reelected after drastically outspending his opponents. Jim Ludwick, *Chávez Raised, Spent Nearly $1.2 Million*, ALBUQUERQUE JOURNAL, 2005 WLNR 16559603 (Oct. 12, 2005).

Albuquerque's limits held more than 90 per cent public approval when they were first enacted. They remained highly popular, garnering 87 per cent support over twenty years later, near the time the Tenth Circuit felt obliged by *Buckley* to dismantle them. See *The Case for Limits on Campaign Expenditures*, *supra*, at 1. In 1998, after living with expenditure limits for more than two decades, Albuquerque's voters expressed their clear view that the City's campaign finance system was working:

- "Support for spending limits in Albuquerque's local elections is overwhelming and intense. More than eight in ten voters favor a law that limits

spending in local election campaigns, including a solid majority which strongly favors the law. Intense support for spending limits crosses gender, age, education, economic and partisan lines."

- "Voters believe that spending limits have made Albuquerque elections more fair and honest than [those in] other big cities. A solid majority agree on this point and the perception crosses party identification * * * ."
- "When voters are presented with two opposing viewpoints, an overwhelming majority believe that stricter and lower limits on campaign spending improves the fairness of elections in Albuquerque. Similarly, after hearing arguments from both sides, two thirds of voters believe that putting stricter limits on campaign spending improves the honesty and integrity of local elections."

Lake Snell Perry & Assoc., *Public Perceptions of Campaign Spending Limits: Finding from a Survey of 400 Registered Voters in the City of Albuquerque, New Mexico*, at 3 *available at* http://www.nvri.org/library/cases/albuquerque/public perceptions_Albuquerque_NM.pdf.

Other analyses of Albuquerque's campaign finance regulations revealed that voter turnout was at least as high as in other cities of similar size, that incumbents had less of a campaign spending advantage, and that officeholders therefore were more vulnerable when compared to incumbents in similar cities. See *Homans* v. *Albuquerque*, 217 F. Supp. 2d 1197, 1200-1201 (D.N.M. 2002). This led one commentator to find that "democracy in Albuquerque is actually as healthy, if not healthier than in other cities," concluding that Albuquerque's campaign spending limits contributed substantially to this outcome. Gierzynski, *Albuquerque Election Financing*, *supra*, at 4.

Of equal importance, Albuquerque's experience belies the argument that mandatory spending limits serve principally to protect incumbents. Opponents of restrictions on campaign expenditures often advance this "incumbency advantage" argument as a primary rationale. See, *e.g.*, Br. of Vermont Republican State Committee at 42-43; Br. of Mitch McConnell as *Amicus Curiae* at 18-22; *Landell*, 382 F.3d at 151, 183, 196, 199 (Winters, J., dissenting). The fact that the argument falls away in the actual practice of spending limits demonstrates the value of state political experimentation over academic hypothesis in this arena.

Albuquerque's experience holds several lessons for this case. It makes clear that campaign expenditure limits may be tailored to effectively address public cynicism regarding the role of money in political campaigns, while also preserving First Amendment values. And more broadly, it reaffirms the importance – often acknowledged by this Court – of relying on the legislative process to produce creative solutions to pressing social problems.

Accordingly, *amici* urge the Court to make clear that limits on campaign expenditures should be subject to close review – but *not* to scrutiny that is "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted). The Court should clarify that caps on spending may be permissible if set at a level that reasonably assures an adequate opportunity to get the candidate's message across to the electorate in an intelligible and comprehensive way. Thus, the constitutional touchstone is a practical one: whether a spending limit is too low to permit the candidate to achieve reasonably broad and consistent access to the electorate. That is a matter on which state legislatures should have discretion, taking into account the nature of the race, the size of the electorate, the availability of media outlets, the costs of various types of communications, and other relevant factors – all subject to judicial review. Such a holding would free state and local governments from artifi-

cial and absolute constraints on their ability to experiment in the realm of campaign finance reform, and thus would equip elected officials with the full complement of tools they need to restore public faith in the democratic process.

CONCLUSION

The Court should affirm the court of appeals' judgment that limits on campaign expenditures may be constitutional, if narrowly tailored and effectively designed.

Respectfully submitted.

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